IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 620

JAMES L. MOORE, ET AL.,
Plaintiffs-Appellants,

vs.

SAMUEL SHAPIRO, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

STATEMENT OF PLAINTIFFS-APPELLANTS IN OPPOSITION TO MOTION TO DISMISS.

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Pursuant to Rule 16 of the Rules of this Court, Appellants respectfully submit this Brief in opposition to the motion of Defendants-Appellees to dismiss the appeal.

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1. It is perhaps worth noting that Appellees' motion was not timely filed. Appellants docketed their appeal on October 8, 1968. Rule 16 of this Court's Rules permits an appellee 30 days within which to file a motion to dismiss. Appellees' motion was filed November 8, 1968, thirty-one days after the docketing of Appellants' Jurisdictional Statement.

ARGUMENT.

CONTRARY TO APPELLEES' ASSERTION OF THE IMPOSSIBILITY OF GRANTING RELIEF, THIS COURT IS IN A POSITION TO GRANT MEANINGFUL RELIEF.

Appellants docketed this cause in this Court on October 8, 1968. On that same day, Appellants filed a "Motion to Advance and Expedite the Hearing and Disposition of this Cause." Appellees filed objections to that motion. On October 11, 1968 Appellants wired their response to those objections. On October 14, 1968, this Court entered the following order:

> Because of the representation of the State of Illinois that "It would be a physical impossibility for the State to effectuate the relief which the appellants seeks," the "Motion to Advance and Expedite the Hearing and Disposition of this Cause" is denied. Mr. Justice Fortas would grant the motion.

Appellees now urge, by their belated motion, that the entire challenge to Section 3 of Article 10 of the Illinois Election Code (Ill. Rev. Stat., 1967, Chap. 46, Sec. 10-3) be dismissed because the General Election of November 5, 1968 has been held and it has thus become impossible to grant any relief to Appellants.

This reasoning leads to a flagrantly outrageous result.

If Appellees' motion to dismiss is granted, a challenge to the constitutionality of the statute is made unreasonably difficult. There is no election-year method of challenging its validity other than the one adopted by Appellants; moreover, it is clear that there was here an expeditious

processing of the appeal. The Illinois Election Code (Ill. Rev. Stat., 1967, Chap. 46, See 10-6) provides for the filing of petitions as late as August 5th and action by the State Election Board *thereafter*. The State Electoral Board rejected Appellants' nominating petitions on August 16, 1968, and Appellants have diligently prosecuted this matter since that date. To accept the position of the Appellees is to preclude *any* meaningful election-year challenge to the Election Code. Clearly, such a result seems unacceptable.

The Appellants could not have moved much faster in the District Court than they did—given the tight time limitations built into the Illinois election laws. The State Electoral Board rejected Appellants' nominating petitions on August 16, 1968. The complaint was filed in the District Court *six days later*. Four days later Appellants went before the Chief Judge, who was then sitting as the emergency judge, for the purpose of having him advise the Chief Judge of the Court of Appeals of a case requiring the convening of a three-judge panel. The Chief Judge, in apparent contravention of 28 U. S. C. § 2284, declined to so advise the Chief Judge of the Court of Appeals and the issue was set down before another District Court judge for hearing on September 10, 1968. Thus, fifteen days expired during which the District Court took no action. Twenty more precious days elapsed before the three-judge court entered its order dismissing the complaint.

Now Appellees ask that Appellants pay for this delay by dismissing their complaint—on an issue of critical importance to the voters of Illinois which will occur again and again. The issue before the Court is not moot—the constitutional question concerning the provision of the Illinois Election Code requiring the signatures of at least 200 qualified voters in fifty counties is as viable today as it was in August. The voters of Illinois and future independent (and

new-party) candidates seeking a place on the ballot are still as much in the dark on this issue as they were in August of this year when that issue is measured against the recent decisions of this Court. The overriding issue has not disappeared by the election of November 5, 1968. It is still present and should be decided now. Illinois will have a state-wide election for treasurer in 1970. Ill. Const. Art. 5, § 3. Appellees seek not simply the dismissal of the complaint—but the dismissal of the issue.

In this case a compelling public interest demands that the issues raised be passed upon. The great weight of authority supports, either directly or by implication, the proposition that an appellate court may hear a case in which there is manifest public interest notwithstanding a suggestion that the case is moot. In *Southern Pac. Terminal Co.* v. *Interstate Commerce Com'n*, 219 U. S. 498 (1897), review was sought of an order of the Interstate Commerce Commission. By the time the case reached this Court, the order attacked had, by its own terms, expired. It was therefore urged that the case had become moot. In response, Mr. Justice McKenna, writing for a unanimous Court, wrote:

> In the case at bar the order of the Commission may to some extent . . . be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing . . . and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress. 219 U. S. at 515.

See also *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290 (1897); *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1938);

Federal Trade Commission v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416 (1947).[2]

Here we are confronted with a question clearly public in nature. The probability that the situation will occur again is substantial, and thus a decision is needed for guidance of public officials and for prospective independent (and new-party) candidates. Unless this Court hears and determines the merits the decision of the three-judge district court below—a decision which relies *solely* on *MacDougall* v. *Green*, 335 U. S. 281 (1948)—will remain and thus breathe life into that case which, in the opinion of Appellants, has in reality long since been by-passed by this Court's "one man-one vote" decisions. In summary then, certain aspects of this case remain very much alive. This Court is thus capable of affording meaningful relief, not only to Appellants but to the citizens of the State of Illinois.

Furthermore, it is of course well-settled that where attendant questions remain, the case is not moot despite the fact that the principal questions may be so considered. *Fiswick* v. *United States*, 329 U. S. 211 (1946); *Heitmuller* v. *Stokes*, 256 U. S. 359 (1921). Here, Appellants, in addition to declaratory and injunctive relief, prayed for "such other and additional relief as may be just and proper." An individual improperly disenfranchised has a cause of

2. Both the Circuit Courts of Appeals and the courts of Illinois have long recognized the wisdom of not being bound by technical concepts of mootness. *Boise City Irr. & Land Co.* v. *Clark*, 131 F. 415 (9th Cir. 1904); *Dyer* v. *Securities and Exchange Comm.*, 266 F. 2d 33 (8th Cir. 1959); *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192 (D. C. Cir. 1940); *Lansden* v. *Hart*, 180 F. 2d 679 (7th Cir. 1950); *People ex rel. Wallace* v. *Labrenz*, 411 Ill. 618, 104 N. E. 2d 769 (Sup. Ct. 1952), cert. den. 344 U. S. 824 (1952); *In Re Estate of Brooks*, 32 Ill. 2d 361, 205 N. E. 2d 435 (Sup. Ct. 1965); *Voisard* v. *County of Lake*, 27 Ill. App. 2d 365, 169 N. E. 2d 805 (1960); *Smith* v. *Ballas*, 335 Ill. App. 418, 82 N. E. 2d 181 (1948).

action for damages. *Smith* v. *Allwright*, 321 U. S. 649 (1944). Should not a like remedy be available to individuals wrongfully deprived of a position on a ballot by officials acting under color of an unconstitutional state law? Clearly, if the statute is unconstitutional, Appellants should be in a position to amend and pray for damages.

For the foregoing reasons, it is respectfully urged that this Court deny Appellees' motion to dismiss and proceed to a hearing on the merits.

Respectfully submitted,

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